1995

# Sonji K. Walker vs. Parish Chemical Company : Brief of Appellant

Utah Court of Appeals


Eric P. Lee; Dart, Adamson and Donovan.
R. Phil Ivie; Jeffery C. Peatross; David N. Mortensen; Ivie and Young.

IN THE UTAH COURT OF APPEALS

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| SONJI K. WALKER, | : | |
| Plaintiff/Appellant, | : | Case No. 950485 |
| vs. | : | Oral Argument<br>Priority No. 15 |
| PARISH CHEMICAL COMPANY, | : | |
| Defendant/Appellee. | : | |

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# BRIEF OF APPELLANT

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APPEAL FROM A JUDGMENT NOTWITHSTANDING THE VERDICT
IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY,
THE HONORABLE JUDGE BOYD L. PARK, PRESIDING

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## JURISDICTIONAL STATEMENT

This matter involves a final judgment granted by a district court, and this court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(k) and § 78-2-2(3)(j)(Supp. 1994), the matter having been transferred by the Utah Supreme Court.

## STATEMENT OF THE ISSUES

The issues raised in this appeal arise out of a trial court's grant of judgment notwithstanding the verdict. The trial court's action was precipitated by a Motion for JNOV or a New Trial filed by the defendant (R.314), memoranda in support of and in opposition to the motion, and oral argument concerning defendant's motion (R. 342, 361, 379, 402, 407). Accordingly, these issues have been preserved for appeal.[1]

**A.** Issue: Whether the trial court properly instructed the jury on the doctrine of res ipsa loquitur.

Standard of Review: Because jury instructions are a matter of law, the appellate court reviews the appropriateness of an instruction under a "correction of error standard." Ames v. Maas, 846 P.2d 468, 471 (Utah Ct. App. 1993). A plaintiff is entitled to a jury instruction on res ipsa loquitur if the plaintiff has presented evidence that the occurrence of the incident is "more probably than not caused by negligence." Ballow v. Monroe, 699 P.2d 719, 722 (Utah 1985). The plaintiff need not eliminate all possible

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[1]The underlying issue of the propriety of a res ipsa loquitur instruction was briefed and argued before the trial court. (R. 56, 999-1021).

inferences of non-negligence if the balance of probabilities weigh in favor of negligence. Id.

B. Issue: Whether the defendant was entitled to judgment notwithstanding the verdict.

Standard of Review: A judgment notwithstanding the verdict can be granted only when the losing party is entitled to a judgment as a matter of law. Hansen v. Stewart, 761 P.2d 14 (Utah 1988). In reviewing a judgment notwithstanding the verdict, the appellate court is governed by the same standard as the trial court; that is, all of the testimony and all reasonable inferences flowing therefrom which tend to prove plaintiff's case must be accepted as true, and all conflicting evidence which tends to disprove it must be disregarded; the judgment notwithstanding the verdict may only be sustained in the absence of any substantial evidence to support the verdict. Coer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Defendant's Motion for Judgment Notwithstanding the Verdict was granted pursuant to Utah Rule of Civil Procedure 50, and therefore that rule is implicated in the present case. See Addendum A. There are no other constitutional provisions, statutes, ordinances, rules or regulations where the interpretation of them would be determinative in this matter.

## STATEMENT OF THE CASE

This case arises out of a fire which occurred on July 24, 1992, on the premises of Parish Chemical Company, the defendant in this matter. (R. 792). Plaintiff claimed the fire was the result of the defendant's negligence and that as a result of the fire hazardous and toxic chemicals were released into the surrounding community. (R. 4). The fire at Parish Chemical was called in to the fire department at 12:41 pm. (R. 791 and plaintiff's exhibit 1b). The fire began less than ten minutes after Parish employees had left the premises. (R. plaintiff's exhibit 18 (timeline constructed as part of the official fire department investigation of the Parish Chemical fire)).

As a result of the fire, a large area near Parish Chemical Company was evacuated. (R. 796). Interstate I-15 was closed off and the traffic therefrom was rerouted through Orem. All streets leading to Geneva Road from 800 North to 400 South were also blocked off. (R. 796). The fire department implemented an evacuation plan which evacuated all residences and businesses in the area of 400 North to 400 South from Geneva Road east to 1200 West. (R. 797). The fire department did not attempt to extinguish the fire, but let it burn out because the department had obtained chemical material data sheets from Parish Chemical Company and thus was informed that the smoke would be toxic. (R. 799).

Utah Valley Regional Medical Center set up an emergency treatment area outside of the hospital to treat patients coming from the area of the fire. (R. 881). The

doctors and nurses wore protective gowns and clothing. Id. The hospital personnel were concerned with coming in contact with persons contaminated by chemicals. Dr. Douglas Ross, a specialist in pulmonary and critical care medicine, personally saw 30 to 40 patients, including the plaintiff, in the special triage unit. (R. 881). A number of patients were complaining that they had been exposed to smoke and fumes from the Parish Chemical fire and had complaints of burning eyes, itching, sore throats, coughing and some shortness of breath as well. (R. 881). The plaintiff Sonji Walker arrived at the hospital and appeared to be one of the more serious cases treated that day. (R. 882).

On the day of the fire, plaintiff Sonji Walker was working at a 7-11 store on 1200 West and Center Street in Orem, Utah. (R. 975). Mrs. Walker observed numerous police cars traveling around 1200 West. However, she was not particularly aware of smoke or fumes. (R. 976). Upon leaving the 7-11, Mrs. Walker had a scratchy throat and was a little bit dizzy. (R. 977). She traveled north on 1200 West and as she drove she started experiencing more exacerbated symptoms such as dizziness and blurry vision. (R.978). At this point, she decided to stop at a friend's house. Id. Her husband picked her up at her friend's house and took her to Utah Valley Regional Medical Center where she was treated for her respiratory problems. (R. 980).

Mrs. Walker felt a lot worse the next day and went to the emergency room again. (R. 980). Subsequent to the fire, Mrs. Walker lost her voice for a little over a month and a half, could only walk very slowly, and experienced headaches. (R. 981). She was

still experiencing headaches at the time of the trial. Mrs. Walker experiences asthma-like symptoms whenever she exerts herself. (R. 982). Although her symptoms generally stabilized 7 to 8 months after the fire, she still experiences shortness of breath. (R. 982). Mrs. Walker testified that she had no respiratory problems prior to the fire. (R. 983).

Dr. Ross testified at trial concerning an illness known as Reactive Airways Disfunction Syndrome (RADS). (R. 889). After reviewing the symptoms, testing, and history which makes up RADS (plaintiff's exhibit 17), Dr. Ross concluded that Mrs. Walker did in fact suffer from RADS. (R. 896). Dr. Ross stated that Mrs. Walker's injuries were more consistent with chemical inhalation as opposed to a normal smoke inhalation injury. (R. 905-906).

At trial, it was plaintiff's position that the defendant had admitted the elements of res ipsa loquitur. A corporate deposition of Parish Chemical Company was taken, and Dr. Wesley Parish appeared at that deposition. At both the corporate deposition and the previous trial, Dr. Parish agreed that: "[T]he fire would either have had to start in one of those two ways. Either someone went into that room and started the fire intentionally, or there was an improper storage which you have of course expressly denied." (R. 933-34). There was no evidence presented at trial that someone had intentionally started the fire.

The other relevant facts are as follows. The fire in this matter started in Stockroom A. Defense counsel stated in opening statement: "Stockroom A will be talked about a lot here in the next few days. It is the place where the fire started. There is no

dispute about that." (R. 783). Mark Karamesines, the Parish Chemical plant manager, admitted that the day before the fire there was a chemical spill on the ground level of the building. (R. 815-16). Mr. Karamesines testified that spilled chemicals can turn to vapor and vapors can travel. (R. 815). Mr. Karamesines admitted that there are substances which when mixed could constitute a fire hazard. (R. 821). Mr. Karamesines testified that he was the plant manager at Parish Chemical Company and that he was in charge of safety for the plant. Mr. Karamesines acknowledged that the chemicals in Stockroom A were hazardous. (R. 813).

Mr. Karamesines testified that when oxidizers and flammables come together they can start fires. (R. 823). Plaintiff's exhibit 10 listed the chemicals in Stockroom A which included flammables and oxidizers. See exhibit 10. Mr. Karamesines admitted that oxidizers and reducing agents coming together could constitute a fire hazard also. (R. 824). Mr. Karamesines admitted that there were chemicals in Stockroom A in containers which if ruptured or broken would create flammable fumes. (R. 842). Mr. Karamesines explained that employees or persons under the control of Parish Chemical modified or attempted repairs in the electrical system at Parish the day before the fire. (R. 825). Mr. Karamesines could not rule out that chemicals in the room could be a source of ignition in and of themselves. (R. 843). Mr. Karamesines also stated that others may have been in Stockroom A the day before the fire and he was unsure whether any employee besides himself had been in the stockroom the day of the fire. (R. 840). Mr. Karamesines testified that he was

familiar with the industry standards of safety at chemical plants (R. 850) and that it was part of his job to look for fire hazards. (R. 836, 840). Nonetheless, Mr. Karamesines admitted that spills of chemicals had occurred at Parish Chemical Company. (R. 837). After testifying that he was familiar with industry standards, Mr. Karamesines acknowledged that the containers in Stockroom A were designed to prevent hazards including fires. (R. 860).

Mr. Karamesines testified that the chemicals were stored on steel shelves. (R. 848). Dr. Parish explained that the building was not constructed of wood, but rather the floors were made of reinforced concrete (R. 920), and that the walls were made of metal lathe, plaster, cinder block, and reinforced concrete. (R. 921). Mr. Karamesines testified that Parish Chemical Company owned the building, that Parish decided who came and went and worked there. Parish Chemical Company did not relinquish control or give up control to anyone else. (R. 844). Parish Chemical also decided who would gain access to Stockroom A and whether Stockroom A would be locked or unlocked. Id. Parish Chemical Company decided what was stored in Stockroom A and how it was stored. Id.

Mr. Karamesines testified that there were no electrical motors in Stockroom A (R. 846), and that there was not any lab equipment, reactor vessels, heaters, or water heaters, baseboard heaters, or any similar appliances. (R. 847). Mr. Karamesines agreed that if jars fell off their shelves and released the contents it was possible the contents could have built up a vapor inside Stockroom A. (R. 874). Mr. Karamesines testified that if the lid of one of the chemical containers was removed or not put on tightly, or the jar was

cracked or leaked it would not have to rupture from breaking on the floor in order to release vapors. (R. 875).

As stated, Wesley Parish, a Ph.D. in chemistry, and president of Parish Chemical Company, testified on behalf of Parish Chemical Company as a corporate representative. He admitted that there were chemicals in the stockroom that if mixed and exposed one to another could start a fire. (R. 923-24). Dr. Parish even observed that there may have been chemicals in Stockroom A which would combust if exposed to air, although he was not aware of particular chemicals. (R. 923). Dr. Parish admitted that there was no way to eliminate the hazard of fire when storing the chemicals which were in Stockroom A. (R. 926). Dr. Parish admitted that the two particular types of chemicals which would be more likely than others to start a fire when mixed together would be oxidizers and reducing agents. (R. 926).

Dr. Parish admitted that Stockroom A contained five gallon containers of iso-octane, which is essentially gasoline. (R. 939-40). Dr. Parish admitted that the fire could have been caused by someone carelessly mixing two chemicals together. (R. 947). In fact, defendant's counsel in opening arguments admitted that chemicals could come together and start fires and defense counsel contended that the evidence would show that Stockroom A was designed specifically to prevent such a problem. (R. 784)[2]. Dr. Parish agreed that:

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[2]See Note 1, supra.

"[T]he only sources for the fire. . . in the building, were the chemicals themselves and their potentially reactive capabilities." (R. 936). Dr. Parish admitted that while he had directed an employee to check back on Parish Chemical Company the day of the fire, at the time of the fire there was no employee on the premises. (R. 954). A statement Dr. Parish had given as part of the fire investigation was read into evidence wherein Dr. Parish stated that there was a 30 gallon reaction vessel downstairs directly below the chemical stockroom. Dr. Parish testified that it could have contained a flammable mixture. In the statement, Dr. Parish opined that if the reaction had exploded, it could have caused chemical jars in the stockroom to fall off the shelves, build up a vapor and cause the fire. (R. 873 & 930) Parish Chemical admitted that in choosing to work with toxic, corrosive, flammable, and dangerous chemicals, it had a duty to keep those chemicals secure. (R. 937).

In an effort to show another cause of the fire, Dr. Parish testified that there were electrical lights in the stockroom and that the electrical lights were an old ballast fluorescent type which he had once seen explode. Dr. Parish testified that when he had seen such a ballast explode, a black tar-like material caught on fire and burned. (R. 1034). Dr. Parish testified that hot burning tar drips out of the ballast, and that such a situation can cause a problem. (R. 1038). However, Dr. Parish did not explain why, while Parish Chemical thought the ballast had a propensity for explosions, the company did not remove the ballast from a room where flammable materials were stored. Nor did Dr. Parish explain why his employees would not insure that the lights were turned off if they had the propensity

to explode or otherwise burn. In fact, Dr. Parish stated he did not think the ballast caused the fire. (R. 1035).

The case was tried and argued to a jury which delivered a Special Verdict on December 21, 1994, finding defendant Parish Chemical Company negligent. (R. 285). The jury further found that such negligence was a proximate cause of the incident in question, and awarded the plaintiff damages. (R. 285). The Judgment on Special Verdict was entered on January 12, 1995. (R. 307). Thereafter, defendant filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial. (R. 314).

Defendant's Motion for Judgment Notwithstanding the Verdict, or for a New Trial, concentrated on a single issue. The defendant claimed that the requisite foundation had not been laid for the court to instruct the jury on the doctrine of res ipsa loquitur. The defendant further contended that absent an instruction on res ipsa loquitur, there was insufficient evidence to support any verdict for the plaintiff and therefore the defendant was entitled to judgment as a matter of law. (R. 342). The trial court entered a Memorandum Decision on April 28, 1995, granting defendant's Motion for Judgment Notwithstanding the Verdict and entering judgment in favor of the defendant. (R. 425) See Addendum B. A final order was signed by the court on May 18, 1995. (R. 432) See Addendum C.

## SUMMARY OF THE ARGUMENT

Parish Chemical admitted the facts which raise an inference of negligence by virtue of res ipsa loquitur. Dr. Parish, stated that the fire either started as a result of arson,

of which there is absolutely no evidence, or as a result of the improper storage and handling of the chemicals at Parish Chemical. (R. 933-34). Upon this basis alone the jury could have rested its verdict.

Res ipsa loquitur is a rule of evidence which allows a party to raise an inference that another has acted negligently, notwithstanding the lack of evidence concerning the party's action. A plaintiff need not eliminate all possible inferences of non-negligence, but need only prove that the balance of probabilities weigh in favor of negligence. In fact, the application of res ipsa loquitur presupposes a plaintiff's inability to point to a specific allegedly negligent act which caused the injury. In this case, the specific evidence concerning the start of this fire was consumed by the fire itself.

The third element of res ipsa loquitur, that plaintiff's actions were not a primary cause of the accident or injury, has been conceded. Only the first two issues of res ipsa loquitur are in dispute: (1) whether the Parish Chemical fire was the type of fire which would have occurred absent negligence, and (2) whether Parish Chemical was in control of the force which caused the injury, or whether Parish Chemical was responsible for all likely causes of the accident or injury.

The circumstances of each case must be reviewed in order to ascertain whether res ipsa loquitur applies. Numerous decisions, including Utah cases, support this position. In fact, Utah appellate courts have announced that the elements of res ipsa are not to be

rigidly applied. Simply stated, there is no presumption against the application of res ipsa loquitur in cases of a fire.

In reviewing the circumstances of this case, the entire structure of Stockroom A was explored. There were no electrical appliances in the room. There was no evidence of any other items in the room except for the chemicals. The defendant or its agents testified that the chemicals could only escape their containers if the lids were not put on tight, or a container was somehow overturned which would be due to defendant's negligence. All other reasonable causes of the fire were discounted, except for defendant's negligence. Under these circumstances, the plaintiff made a prime facie showing that the fire at Parish Chemical was the kind of fire which does not occur absent negligence.

The defendant was responsible for all likely causes of the accident and was in control of the instrumentality which caused the injury. Model Utah Jury Instruction 4.1, the instruction which the trial court gave and to which defendant did not object, states as a second element of res ipsa loquitur:

> The accident or injury was caused by a force that was controlled only by the defendant, or, if you cannot specifically identify the force, that the defendant was responsible for all likely causes of the accident or the injury.

Thus, the instruction itself contemplates that a plaintiff might not be able to specifically identify a force causing the accident or injury. Instead, as the Utah Supreme Court has pointed out, the second factor of res ipsa loquitur, exclusive management or control, may be established by showing that more likely than not the defendant was the party responsible for

the injury. This the plaintiff accomplished. The trial court below, in granting judgment notwithstanding the verdict, found that the plaintiff had not proven this element. However, no analysis in the court's conclusions of law buttresses this conclusion. In fact, the court's conclusion in granting the judgment notwithstanding the verdict is exactly opposite to that which the court made at trial. Parish Chemical owned the chemicals, owned the building where the chemicals were stored, and instituted measures to keep other individuals from entering the building. Parish Chemical decided what chemicals to store in Stockroom A and its employees did not relinquish the control of the building to any persons at any time prior to the fire. Thus, the control over the chemicals in Stockroom A was established.

The law requires only that the plaintiff show defendant's management or control necessary to provide an inference of liability. Plaintiff presented a prima facie case of control and therefore, the issue should have gone to the jury. Even if rigidly applied, plaintiff met her burden.

The trial court erred in concluding that (1) the fire was of a type which would ordinarily occur absent negligence, and (2) that the defendant was not responsible for all likely causes of the accident. The court improperly granted judgment notwithstanding the verdict, and because the matter was properly submitted to the jury, and the verdict is presumed valid, the trial court's judgment should be reversed and the verdict of the jury reinstated.

## ARGUMENT

### I. AN INSTRUCTION ON RES IPSA LOQUITUR WAS CORRECTLY GIVEN

#### A. PARISH CHEMICAL ADMITTED TO THE ELEMENTS OF RES IPSA LOQUITUR

Parish Chemical admitted facts which raise an inference of negligence. At trial, Dr. Parish testified and read from his own deposition, taken pursuant to a notice of corporate deposition. The question was asked:

> Either someone improperly stored them, leaks or spills or didn't clean up a spill or whatever, otherwise there may have been negligence or there was arson, but by putting the bottles next to each other, to use your word, "doesn't constitute a fire hazard." So the fire would either have had to start in one of those two ways. Either someone went into that room and started the fire intentionally or there was an improper storage which you have of course expressly denied, is that fair, and you responded?
> Answer: That is pretty fair. The room was inspected on a fairly regular basis.

(R. 933-34). There was no evidence of arson.[3] Thus, by Parish's own admission, with arson discounted the only other cause of the fire was negligence.

After all the evidence was presented, the judge instructed the jury. Included in those instructions was an instruction on the doctrine of res ipsa loquitur. (R. 263). Instruction number 15 provided:

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[3]In fact, the preponderance of the evidence indicated that there was no arson. Dr. Parish and Mr. Karamesines testified that the building was secured. They also testified that a large fence with barbed wire on top surrounded the back side of the Parish Chemical building. The evidence showed that employees of Parish Chemical were in the building shortly before the fire. Lastly, there was no affirmative showing of arson.

> Ordinarily, the plaintiff must prove negligence and proximate cause by a preponderance of the evidence. However, under certain circumstances, one who suffers injuries may hold another responsible without direct proof of negligence. You may draw an inference of negligence and proximate cause if you find that the accident or injury occurred under the following conditions:
>
> 1. The accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used due care;
>
> 2. The accident or injury was caused by a force that was controlled only by the defendant, or if you cannot specifically identify the force, that the defendant was responsible for all likely causes of the accident or injury; and,
>
> 3. The plaintiff's actions were not the primary cause of the accident or injury.
>
> If you find that all of those conditions exist, then you may conclude that the defendant was negligent and that the defendant's negligence was a proximate cause of the plaintiff's accident or injury. However, you are not required to reach that conclusion. You should weigh all of the evidence in the case and decide whether a finding of negligence is warranted.[4]

The above quoted instruction is found in the Model Utah Jury Instructions at 4.1. As to the amount of care required in this case, the jury was instructed: "The amount of care that is considered "reasonable" depends on the situation. Some situations require more caution because a person of ordinary prudence would understand that more danger is involved." (R. 262). As will be shown hereafter, the jury could have easily concluded that

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[4]As case law in support of the instruction, the instruction committee referenced Dalley v. Utah Valley Regional Medical Center, 791 P.2d 193 (Utah 1990); Ballow v. Monroe, 699 P.2d 719 (Utah 1985); Kusy v. K-Mart Apparel Fashion Corp., 681 P.2d 1232 (Utah 1984); Anderton v. Montgomery, 607 P.2d 828 (Utah 1980); and Robinson v. Intermountain Health Care, Inc., 740 P.2d 262 (Utah Ct. App. 1987).

a person or company exercising ordinary prudence should have taken more precautions than Parish Chemical did, even absent the admission of the defendant.

After reviewing the evidence and considering the instructions which had been given it by the court, the jury returned a verdict in favor of the plaintiff finding defendant Parish Chemical Company negligent and a proximate cause of the plaintiff's injuries. (R. 285). Nonetheless, after the jury returned its verdict, the trial court held the res ipsa instruction erroneously given and concluded that absent the res ipsa instructions reasonable minds could not differ. In a Memorandum Decision dated April 28, 1995, the trial court concluded that it was "in error in allowing the jury to be given an instruction on the res ipsa loquitur doctrine. The court grants defendant's Motion for Judgment Notwithstanding the Verdict." (R. 414-15).

A review of the evidence and applicable law shows that the plaintiff had met her burden and provided an adequate foundation for the jury to be instructed upon the doctrine of res ipsa loquitur. In Anderton v. Montgomery, 607 P.2d 828 (Utah 1980), the court explained:

> It is often the case that a plaintiff, while suffering injury which was caused by a force or agency allegedly instigated by defendant's conduct, is unable to produce evidence pinpointing a given act or omission on the part of defendant which breached a legally imposed standard of care. Where this is the case, the law permits plaintiff to withdraw from the specific conduct constituting negligence, and concentrate upon presenting evidence probative of circumstances which would permit the trier of fact to infer that defendant had engaged in negligent conduct to the injury of the plaintiff.

Id. at 833. The Anderton court stated further:

> It is to be noted that the weighing of evidence presented to establish the [elements of res ipsa loquitur], like all other questions of fact, is within the province of the jury; where the trial court determines that the evidence, viewed in a light most favorable to the plaintiff, could establish the prerequisites to the application of the doctrine, an instruction to that effect is proper.

Id. at 833-34. The Utah Court of Appeals in Kitchen v. Cal Gas Co., Inc., 821 P.2d 458, 463 (Utah Ct. App. 1991) explained: "Res ipsa loquitur is a rule of evidence which allows a party, in certain circumstances, to raise an inference that another party has acted negligently, notwithstanding a lack of evidence concerning the other party's actions." The "application of res ipsa loquitur presupposes a plaintiff's inability to point to a specific allegedly negligent act which caused the injury." Hornsby v. Corp. of The Presiding Bishop, 758 P.2d 929, 934 (Utah Ct. App. 1988). The plaintiff need not eliminate all possible inferences of non-negligence, but only prove that the balance of probabilities weigh in favor of negligence.[5] Ballow v. Monroe, 699 P.2d 719, 722 (Utah 1985). Plaintiff concedes that she cannot point to the specific act of negligence which caused the fire; however, plaintiff established plentiful circumstantial evidence so as to raise an inference of negligence.

Numerous courts have stated that the three elements of res ipsa loquitur "must be applied with the recognition that they are not rules that must be rigidly applied in all

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[5]The trial court stated: "Well, I don't think to get to a res ipsa case that you have to rule out everything in the world." (R. 1017), See Addendum D.

cases, but guidelines for the type of circumstantial evidence that can be used to make out a prima facie case of negligence." Ballow, 699 P.2d at 721. See also King v. Searle Pharmaceuticals, Inc., 832 P.2d 858, 861 (Utah 1992). Viewing the elements of res ipsa and the circumstantial evidence presented at trial leads to the conclusion that the plaintiff met her burden in this case. Since Stockroom A had been completely gutted by fire, the plaintiff was forced to establish her case via circumstantial evidence.

At trial and in defendant's Motion for Judgment Notwithstanding the Verdict, the third element of res ipsa loquitur, that the plaintiff's actions were not the primary cause of the accident or injury, was conceded. (R. 340, 360, and 1003). In fact, the evidence is quite clear that the plaintiff had nothing to do with the fire at Parish Chemical Company other than coming in contact with the smoke from the fire and suffering an injury thereby. Accordingly, only the first two elements of res ipsa are in dispute: (1) whether the Parish Chemical fire was the type of fire which would have occurred absent negligence, and (2) whether Parish Chemical was in control of the force causing the injury, or whether Parish Chemical was responsible for all likely causes of the accident or injury.

## B. THE FIRE AT PARISH CHEMICAL COMPANY WAS A TYPE OF ACCIDENT WHICH DOES NOT ORDINARILY OCCUR ABSENT NEGLIGENCE

The defendant argued below that res ipsa loquitur could never apply to cases of fire of unknown origin. (R. 336-340). In order to maintain this assertion, defendant argued that the court must consider fires generally and should not look to the facts of this

particular case. To apply res ipsa loquitur in such a fashion elevates form over fairness and renders hollow the announcements of the Utah Appellate Courts that the elements of res ipsa loquitur are not to be applied rigidly. Instead, the better reasoned approach is to look at the facts of the case and instruct the jury to look at the type of accident involved; that is, whether the accident at issue would have ordinarily occurred if someone had used due care.[6]

In Olswanger v. Funk, 470 S.W.2d 13 (Tenn. Ct. App. 1970) the court stated:

> Counsel for defendant cites a number of cases from other jurisdictions, many of which deny the application of [res ipsa loquitur] in fire cases, but it is apparent from an examination of these cases that the courts hold, in the last analysis, that application of the doctrine of res ipsa loquitur, or lack of application, must of necessity depend upon the facts and circumstances of the particular case.

Id. at 15. "[W]hether a fire case falls within the operation and scope of the res ipsa loquitur rule must of necessity depend upon the particular facts and circumstances appearing in the individual case." Id. at 15-16 citing Menth v. Breeze Corp., 73 A.2d 183, 186 (N.J. 1950). Likewise, the court in Oakdale Building Corp. v. Smithereen Co., 54 N.E.2d 231 (Ill. Ct. App. 1944) concluded:

> From these considerations it follows that the quantum of proof which a plaintiff must give in order to draw from the defendant explanatory evidence must, within certain limits, be dependent upon the circumstances of each

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[6]The trial court concluded at trial: "It appears to me that I am going to have to conclude that is a sufficient inference, the accident was the kind which in the ordinary course of events would not have happened. . . had the defendant used due care." (R. 1015-16), See Addendum D.

> case, -- a rule which finds the current expression in the phrase res ipsa loquitur.

Id. at 233. (quoting Bahr v. Lombard Ayres & Co., 21 A. 190, 191-92 (N.J. 1890)).

In the present matter, the jury was presented with the facts showing a room filled with nothing but chemicals. The chemicals were kept in sealed bottles, some of which had caps to ensure that no vapor would be released. Other than the chemicals, there was nothing else in the room. The chemicals were stored on steel shelving, the floor was made of reinforced concrete, and the walls were also made of material which does not burn. In fact, a review of the pictures of the fire's aftermath show that the walls and floor of the building remained intact after what was described by the defendants as a very hot fire. (R. exhibits 2 through 3a-k; 5a-e). Thus, the real question facing the trier of fact, and facing the trial court in deciding whether a proper a foundation for res ipsa loquitur had been established, was whether a room full of chemicals all in sealed containers would burn if due care had been used. Plaintiff established to a reasonable degree the absence of other causes of the fire. Thus, plaintiff did establish that the fire at Parish Chemical was not the kind of fire which ordinarily occurs absent negligence.

## C. THERE EXISTS NO PRESUMPTION AGAINST THE APPLICATION OF RES IPSA IN CASES INVOLVING FIRES

Such a conclusion is supported by case law from several jurisdictions. For example, in Horner v. Barber, 40 Cal. Rptr. 570 (Cal. Ct. App. 1964) a trial court submitted a case to a jury under the doctrine of res ipsa loquitur although the exact cause of

the fire was unknown.[7] In Horner, the plaintiff and defendants occupied separate parts of the same building where the defendants had a garage business in their portion. A fire started in the portion of the building occupied by the defendants causing the entire building to burn down including that portion owned by the plaintiff. In submitting the case to the jury on the doctrine of res ipsa loquitur the court styled the first element of res ipsa as follows: "One of the questions for you to decide in this case is whether the fire occurred under the following circumstances: First, that it is the kind of fire which ordinarily does not occur in the absence of someone's negligence." Id. at 571 n.1. Thus, there is no presumption against the application of res ipsa loquitur when the case involves a fire. Accord, Standard Oil Co. of New Jersey v. Midgett, 116 F.2d 562 (4th Cir. 1941); Pine Ford, Inc. v. Shankle, 528 S.W. 2d 392 (Ark. 1975); Megee v. Reed, 482 S.W. 2d 832 (Ark. 1972); Oakdale Building Corp. v. Smithereen Co., 54 N.E. 2d 231 (Ill. Ct. App. 1944); Cox v. Stafford, 460 S.W. 2d 818 (Ky. 1970); Commonwealth v. Montour Transport Co., 73 A.2d 659 (Penn. 1950); Olswanger v. Funk, 470 S.W. 2d 13 (Tenn. Ct. App. 1970); Southern Gas Corp. v. Brooks, 359 S.W. 2d 570 (Tenn. Ct. App. 1961). Instead, the circumstances of each case should be reviewed.

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[7]"Res ipsa may apply where the cause of the injury is a mystery, if there is a reasonable and logical inference that defendant was negligent, and that such negligence caused the injury." Fowler v. Seaton, 394 P.2d 697, 700 (Cal. 1964) (citing Prosser on Torts (2d ed. 1955) §421 at 204).

## 1. UTAH APPELLATE COURTS HAVE NEVER STATED ANY RULE THAT RES IPSA DOES NOT APPLY TO CASES OF A FIRE

Utah law supports the proposition that the facts of each case should be reviewed and that there is no presumption against the application of res ipsa loquitur when fire is involved. Ballow v. Monroe, 699 P.2d 719 (Utah 1985); Wightman v. Mountain Fuel Supply Co., 5 Utah 2d 373, 302 P.2d 471 (1956); Barnhill v. Young Electric Sign Co., 13 Utah 2d 347, 374 P.2d 211 (1962). In each of these Utah cases fire was the force that caused the injury. Yet, there is no statement from any Utah Appellate Court that the doctrine of res ipsa loquitur is inapplicable based upon this fact alone.

As explained, the entire structure of the room was outlined at trial. There were no electrical appliances in the room. The defendants were given an opportunity to think of any other items in the room which could have caught fire. Nonetheless, there was no evidence of any other items in the room except for chemicals. The defendant and its agents testified that the chemicals could only escape their containers if a lid were not put on tight or a container was somehow overturned. Thus, all other reasonable causes of the fire were discounted, except for defendant's negligence. Under these circumstances, the plaintiff had made a prima facie showing that the fire at Parish Chemical was the kind of fire which does not occur absent negligence. Utah law supports this conclusion.

In Wightman v. Mountain Fuel Supply Co., 5 Utah 2d 373, 302 P.2d 471 (1956), the Utah Supreme Court reviewed a case where an explosion of natural gas resulted

in a fire destroying a home in Spanish Fork, Utah. Since no specific acts of negligence could be proved, the plaintiff relied upon res ipsa loquitur. However, the trial court dismissed the case upon the basis that the elements of res ipsa had not been met. The court did so by finding that the second element of res ipsa was not met, i.e. the natural gas was not under the exclusive control of the defendant. But, as to the first element, the court stated that it simply had to be conceded that the first element was satisfied in that the accident was of a kind which, in the ordinary course of events, would not have happened.

The court's decision in Ballow v. Monroe, 699 P.2d 719 (Utah 1985) supports plaintiff's position as well. In Ballow, the plaintiff brought a negligence action against his neighbor to recover damages for the loss of 100 acres of wheat which had been destroyed by a fire allegedly caused by the defendant when swathing an adjoining field. The plaintiff submitted three res ipsa loquitur instructions which the trial court refused to give. The jury returned a verdict for the defendant and the plaintiff thereafter appealed. As recognized by the court in Ballow, the appeal centered on the applicability of the first res ipsa element. The Ballow court stated:

> If the law imposes a duty of great care, or a duty to inspect for dangerous conditions, the giving of a res ipsa instruction may be justified on a less compelling degree of probability than if the degree of care required were only reasonable care.

Id. at 722. At the trial of the case at bar, defendant's employee Mr. Karamesines stated that it was his job as the manager of Parish Chemical Company to inspect Stockroom A, and that

such an inspection was mandated by industry standards of care. Likewise, Mr. Karamesines stated that he needed to inspect the stockroom due to numerous hazards, one of which was fire. Under these circumstances, a "less compelling degree of probability" would have called for the res ipsa instruction. However, even without a higher duty placed upon Parish Chemical, the res ipsa instruction was proper.[8]

For example, in Ballow, the court was faced with a case of res ipsa applied to a fire. Nowhere in the decision, or in any decision in the State of Utah, exists any statement that res ipsa loquitur is not applicable to cases of fire. Instead, in every instance, the appellate courts of Utah have looked to the underlying circumstances of the case. In Ballow, the court came to the conclusion that res ipsa loquitur was not applicable, not upon the basis that it involved a fire and was therefore outside the scope of res ipsa, but instead the court concluded that res ipsa loquitur was irrelevant in that the defendant's conduct was known and the relationship of that conduct to the damage was known as well. Accordingly, res ipsa loquitur was irrelevant.

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[8]The trial court stated: "Now how the fire got to that source [the chemicals] without there being some spillage is really, in my mind, an impossibility. If there is no spillage of any of the chemicals or if there was no explosion to blow the chemicals off the shelves so that they can be broken and then exposed, then the only other way is, in my view, is that there has to be some inference of negligence in which these chemicals were made available to some source which triggered the fire some ignition source whether it was inside the room or whether it was outside of the room. The fire burned there and in my view this then becomes a res ipsa case, okay."
(R. 1016-17), See Addendum D.

Likewise, the court in Ballow found that the evidence "cast[s] no light on whether the fire which burned plaintiff's property was probably caused by the defendant's negligence." Id. at 723. In contrast, the case at bar presents a significant difference; there was nothing in Stockroom A other than the containers of chemicals. Accordingly, the fire could have started by a container being opened and emitting a vapor, by bad storage, or by the simple fact that the defendant was storing numerous chemicals which were flammable, toxic, and corrosive in the same room as containers of iso-octane, which is essentially gasoline. Thus, the probabilities of the accident occurring due to defendant's negligence was far greater in the present case than in Ballow.

When the present case is compared to Barnhill v. Young Electric Sign Co., 13 Utah 2d 347, 374 P.2d 311 (1962) one can understand why res ipsa loquitur was not applicable in the Barnhill case, but was correctly given in the present matter. Barnhill involved a fire of unknown origin. Nonetheless, the court made no statement that the doctrine of res ipsa loquitur was not inapplicable. Instead, the Utah Supreme Court looked to the facts of the case. The court stated: "The sole question is whether plaintiff presented sufficient evidence to enable him to go to the jury." This is the same question which is presented by this appeal. Barnhill involved facts where a business establishment owned by Barnhill was totally destroyed by fire. Mr. Barnhill sued the Young Electric Sign Company which had been responsible for the installation and maintenance of a large electric sign on top of Mr. Barnhill's building. The evidence in Barnhill only showed that the day before the

fire Young Electric Sign personnel had been working on the sign. There was conflicting testimony about when the fire started, with some witnesses observing a fire inside the building itself. There was also conflicting testimony as to whether the sign was turned on.

The Supreme Court in Barnhill sustained the trial court's directed verdict against Mr. Barnhill by noting that the evidence showed that the sign was turned off three hours prior to the fire being discovered. Most importantly, there were many other possible causes of the fire such as the gas furnace, the stove, cigarette butts left smoldering, and other causes produced by a windstorm. The plaintiff had produced no evidence to show when the transformer had allegedly fallen from the sign or if, when it fell, it carried electricity. Finally, the court found it was as likely as not that the transformer fell from the sign after the electricity was off and after the sign had been damaged by fire. In Barnhill, the building at issue was not in the exclusive control of Young Electric Sign Company, but instead was under the control, at least partially, of the plaintiff himself. Such is not the case here. In the case at bar there are not numerous other possible causes of the fire such as gas furnaces, stoves, or cigarette butts left smoldering. In fact, if cigarette butts were left smoldering, or if a stove or gas furnace had been left on in Stockroom A, such facts would lend credence to plaintiff's assertion of negligence. Plaintiff in this case showed that the instrumentality or cause of plaintiff's injuries were the chemicals in Stockroom A over which the defendant had complete control. Thus, by contrasting the facts of the present case to the Barnhill decision, the reasons why res ipsa loquitur was applicable in this case become more apparent.

The case of Lund v. Phillips Petroleum Co., 10 Utah 2d 276, 351 P.2d 952 (1960), is also instructive. In Lund, plaintiffs brought an action for damage to the paint on their automobiles allegedly caused by some substance in the smoke and soot emitted from a flare stack at Phillips' oil refinery. The plaintiffs could not identify the material which had come from the refinery, but only had evidence that their automobiles had been damaged. The jury found for the plaintiffs and the defendant appealed on the basis that the doctrine of res ipsa loquitur was not applicable. The defendant in Lund claimed there was no proof that the soot came from its flare stack, or that it was negligent in its operations. The defendant claimed instead that the evidence showed that it had exercised due care with respect to the flare stack and that the jury could not have reasonably found it negligent. The court in Lund explained:

> It is not to be questioned that if we place the emphasis on the defendant's point of view and survey the evidence in the light most favorable to its contentions, a very good case can be made to support them. However, such is not the method of review. If the evidence and inferences that fairly may be drawn therefrom viewed in the light most favorable to the plaintiffs can reasonably be seen as providing a factual foundation which will support the application of the doctrine of res ipsa loquitur, the submission to the jury on that theory was justified, because the plaintiffs were entitled to have the case submitted upon their theory.

Id. at 953. Thus, the proper question as to foundation is not whether the evidence preponderates in favor of a finding that the accident was of a kind which normally would not occur absent negligence, but whether there was any evidence. Accord Anderton, 607 P.2d at 833. In the case at bar, plaintiff was likewise entitled to her theory. Of course, the trial

court below allowed the jury to make its verdict and then the court disagreed with the jury's determination.

In Lund, the defendant insisted that the evidence provided no basis except for conjecture that the soot came from its flare stack. Speaking of the standards of proof, the court itself countered:

> It may be conceded that the evidence does not so prove as to exclude doubt. The law does not exact any such standard of proof; nor even that which a litigant seeking to avoid liability might demand. The standard of proof required is by a preponderance of the evidence, which is further defined as the greater weight of the evidence, or as is sometimes stated, such degree of proof that the greater probability of the truth lies therein.

Id. at 954. In holding that the case was properly submitted to the jury on the doctrine of res ipsa loquitur, the court expounded:

> One of the chief merits of the jury system is that it brings together a group of persons representing a cross-section of the community and takes advantage of their differences in point of view and obtains the benefit of their composite judgment. It is obviously necessary to allow some latitude for the orbit within which reasonable minds may operate. To be sustainable in law the verdict need only fall within that orbit so that it can be said that there is substantial evidence from which reasonable minds could believe facts which will support it. Applying that principle here: even though the evidence was not such to oblige the jury to find in accordance with the plaintiff's claims, it seems hardly open to question that they could, within the limits of reason, have believed as they did: that the soot came from defendant's stack.

Id. Likewise, in the present matter, it was not outside the orbit of reason that a jury could find that the fire in this case was of an unusual type in that it came from a room containing

nothing but chemicals. Thereby, the jury reasonably came to the conclusion that the defendant was responsible for the fire itself.

In Lund, the defendant further argued that there was no evidence that it caused damage to the plaintiffs' automobile. In dismissing this argument, the court stated:

> This argument practically ignores the purpose of the doctrine of res ipsa loquitur, namely: to permit one who suffers injury from something under the control of another, which ordinarily would not cause injury except for the other's negligence, to present his grievance to a court or jury on the basis that an inference of negligence may reasonably be drawn from such facts; and cast the burden upon the other to make proof of what happened. This inference of negligence remains in the case; it justifies its submission to the jury; and will sustain a finding of negligence, even though there be countervailing evidence, unless such adverse evidence so conclusively shows non negligence of the defendant that reasonable minds, acting fairly could not find it negligent.

Id. at 954-55. No evidence in the case at bar conclusively shows non-negligence.

Finally, the court in Lund stated:

> When a trial judge has submitted a cause to a jury and its verdict is under attack there are several important considerations to be weighed which relate to the fundamental right of litigants to have a trial by jury, which is firmly ingrained in our law. . . . If the courts were ready to override jury verdicts whenever they disagreed with them, the right of trial by jury would be effectively abrogated and the trial may as well be to the court in the first place. . . . It is to serve the policy of safeguarding the right of trial by jury that in doubtful cases the doubts are resolved in favor of submitting the case to the jury; and in favor of supporting the verdict when rendered.

Id. at 955-56. In this case, the trial court overstepped its bounds and committed error by granting judgment notwithstanding the verdict. Plaintiff's right to trial has been abrogated. The plaintiff made a prime facie case, the jury found in plaintiff's favor, and the trial court

should have sustained that verdict. Because the defendant was not entitled to judgment as a matter of law, the judgment notwithstanding the verdict should be vacated and the jury's verdict reinstated.

### 2. THE LAW IN SISTER JURISDICTIONS SUPPORTS A FINDING THAT RES IPSA APPLIES IN THIS CASE

Decisions from sister jurisdictions support the conclusion that the mere fact that an accident involves a fire does not preclude it from the application of res ipsa loquitur. In Primm v. Kansas Power & Light Co., 249 P.2d 647 (Kan. 1952), the Kansas Supreme Court was faced with facts where an explosion had occurred at a power plant. Numerous employees of the power plant were injured and brought claims for damages against the power plant. The court in Primm found that the plaintiffs were employees of the company and that therefore their sole remedy for injuries was under the Workmen's Compensation Act. However, the claims of the plaintiffs for personal property damage were allowed to go forward under the doctrine of res ipsa loquitur. In reviewing the applicability of res ipsa loquitur, the Primm court stated:

> [T]hat whether the doctrine is to be applied depends on the character of the accident and the circumstances under which it occurred; that where the accident occurs under such circumstances that direct evidence is not available and the circumstances are such the accident would not have occurred unless the defendant was at fault. . .

Id. at 651. Thus, the circumstances of this case must be reviewed, and it is with an eye toward those circumstances that the court should have denied defendant's Motion for Judgment Notwithstanding the Verdict.

The courts of sister jurisdictions have applied the doctrine of res ipsa loquitur even where the cause of the fire is unknown or unspecified. In Oakdale Building Corp. v. Smithereen Co., 54 N.E.2d 231 (Ill. Ct. App. 1944), an agent of the defendant had been in the sole possession and control of the plaintiff's apartment for the purpose of pest extermination. A fire of unknown origin was discovered 15 minutes after the exterminator left. The Supreme Court of Illinois held that the case should have been submitted to the jury under the doctrine of res ipsa loquitur where the trial court had refused to do so. Upon the basis that the exterminator's agent had been in exclusive control of the apartment, simply by his presence, for approximately one-half hour and that the fire had started shortly thereafter, the court found that res ipsa loquitur applied. The court held that to allow the exterminator to escape liability, after the plaintiff had introduced all the evidence that they possibly could under the circumstances, would be a perversion of the rule upon which res ipsa loquitur is founded. Id. at 233.

Likewise, in Olswanger v. Funk, 470 S.W.2d 13 (Tenn. Ct. App. 1970), the doctrine of res ipsa loquitur was held applicable in an action by a landlord against his tenants for fire damage to an apartment. The court held res ipsa loquitur applicable although there was no direct evidence as to the cause of the fire. The only evidence of the fire's origin was

that it apparently originated in a couch in the living room of the apartment. Once again, the court found it relevant that the fire had erupted 30 minutes after the tenants left the apartment. The court found that the circumstances of the case strongly suggested that the fire occurred as a result of some act or omission. Obviously, the court did not conclude that, simply because a fire had occurred, res ipsa loquitur was not applicable.

In Olswanger, the court concluded that the couch had been under the control of the tenants and therefore supported the doctrine of res ipsa loquitur. In this case, the facts are much more compelling. There is little question that Parish Chemical Company had exclusive control over Stockroom A, and over the entire building. Similarly, like both Olswanger and Oakdale, the employees at Parish Chemical had not been gone from the building ten minutes before the fire was called into the fire department. See also Roland Assoc., Inc. v. Pierce, 476 S.W. 2d 758 (Tex. Ct. App. 1972) (lessee of building liable to owner for damages from a fire which allegedly started in a paint spray booth which was being cleaned by the lessee's employees and where no specific cause is mentioned in the opinion).

In this case, the jury could have easily concluded that a room full of chemicals, kept under the conditions as testified to by the defendant and its agents, would not have caught fire absent a lack of due care. The trial court's conclusion that reasonable minds could not differ on this point was an error in law and the court's granting of judgment notwithstanding the verdict should be reversed and the verdict reinstated.

## D. THE DEFENDANT WAS RESPONSIBLE FOR ALL LIKELY CAUSES OF THE ACCIDENT AND WAS IN ANY EVENT IN CONTROL OF THE INSTRUMENTALITY WHICH CAUSED INJURY

The second element of res ipsa loquitur which the plaintiff proved is that:

> The accident or injury was caused by a force that was controlled only by the defendant, or, if you cannot specifically identify the force, that the defendant was responsible for all likely causes of the accident or the injury.

MUJI 4.1. (R. 263) As to this element, the Utah Supreme Court in Ballow v. Monroe, 699 P.2d 719, 721 (Utah 1985) explained:

> [T]he second factor, exclusive management or control, is not necessarily a sine qua non of the doctrine but may establish that it is more likely than not that the defendant was the party responsible for the injury. Something less than exclusive control of the instrumentality causing the damage may be sufficient if the evidence demonstrates the probability that the defendant was responsible for the damage caused.

In King v. Searle Pharmaceuticals, Inc., 832 P.2d 858 (Utah 1992), the court stated:

> The second element, exclusivity of management or control, should not be rigidly applied. Rather, that element should focus on the degree of a defendant's management or control necessary to provide a persuasive inference of liability on the defendant's part. In other words, something less than exclusive management or control may suffice to make out a prima facie case of res ipsa loquitur. To establish the second requirement, the plaintiff need only show "that it is more likely than not that the defendant was the party responsible for the injury."

Id. at 862. citing Ballow, 699 P.2d at 721.

The trial court below, in granting judgment notwithstanding the verdict, found that the plaintiff had not proven this element. However, no analysis in the court's

conclusions of law buttresses this conclusion. In fact, the trial court's conclusion in granting judgment notwithstanding the verdict is exactly opposite to that which the court made at trial. There the court concluded:

> There is no question that Parish Chemical had control of the building, had control of the chemicals, had set up a variety of safety features to prevent people from interloping on the property to prevent stealing, to prevent accidents of any kind. There is no question about that they have done that. That means then that is strictly within their control. But those chemicals do not erupt and they do not have a force of fire and whether there is an explosion or not may be or may be not, but there has to be a source in which the fire can go in order to continue. That source obviously was in that room.

(R. 1016) See Addendum D. All of the evidence in this case points to the conclusion that Stockroom A was under the control of Parish Chemical Company. Parish Chemical owned the chemicals, owned the building where the chemicals were stored, specifically Stockroom A, and had instituted measures to keep any other individuals from entering the building. Parish Chemical decided what chemicals to store in Stockroom A. Parish Chemical and its employees did not relinquish control of the building to any persons at any time prior to the fire.

Thus, the control over the chemicals in Stockroom A was established. The instrumentality causing the damage in this case was the chemicals. The chemicals were the only materials that could burn in Stockroom A and whether the ignition was by blowtorch, by spark, or by burning light ballasts, the instrumentality under the defendant's control which caused the problem was the chemicals themselves. No reasonable argument exists that the

chemicals were not under Parish Chemical's control at all times. Accordingly, applying the second element of res ipsa loquitur with an eye towards Utah Supreme Court's prior decisions in Ballow and King, the issue of control was established and all probabilities lead to the conclusion that defendant was responsible for the damage caused and in control of the instrumentality causing the damage.

The law requires only that plaintiff show defendant's management or control necessary to provide an inference of liability. Plaintiff has presented a prima facie case of control and therefore the issue should have gone to the jury. Even if rigidly applied, plaintiff met her burden. Again, the trial court's and the appellate court's role in reviewing the applicability of res ipsa loquitur is not to determine whether under the circumstances of this case the judge or judges would apply res ipsa, but only if a prima facie case had been made out so that the issue should be submitted to a jury.

Whether employees of the defendant Parish Chemical Company were on the premises is irrelevant. The evidence showed that Parish Chemical owned the building, controlled what was stored therein, particularly in Stockroom A, and controlled access to the building. Additionally, employees of Parish Chemical were at the building within ten minutes or less before the fire. Under these same facts, courts have applied res ipsa and found the element of exclusive control. Oakdale Building Corp. v. Smithereen Co., 54 N.E.2d 231 (Ill. Ct. App. 1944). As previously stated in Oakdale, the evidence showed that one of the tenants was home alone and left the apartment an hour before the exterminator

arrived. The exterminator remained in the apartment for half of an hour. Somewhere between 15 minutes and a half-an-hour after the exterminator left, the apartment was found to be engulfed in flames. The court found that for approximately one-half hour the defendant's agent was in exclusive control of the apartment and that the fire started shortly after he left. Upon that basis, the court concluded that the jury could infer that the fire could easily have started while the exterminator was there. Therefore, the Illinois Court of Appeals reversed the trial court and remanded the matter to be submitted to a jury upon the doctrine of res ipsa loquitur.

Likewise, in Olswanger v. Funk, 470 S.W.2d 13 (Tenn. Ct. App. 1970) a landlord sued his tenants for damages resulting from a fire in the apartment. There was no dispute that the defendant tenants were the sole occupants of the lease premises and retained exclusive control over the same. Although there was no direct evidence as to the cause of the fire, there was some evidence that the fire may have started on a couch located in the apartment and upon proof that the defendants had left the apartment and locked the door thereto, the court found that the couch and the apartment were under the exclusive control of the defendant and therefore allowed the case to go forward under res ipsa loquitur.

There is no evidence whatsoever in the record of anyone controlling the building or its contents other than Parish Chemical. In fact, employees of Parish Chemical were at the building within 10 minutes or less of the fire. It is not a leap for the jury to find that Parish Chemical was in control of the building. In this case, the plaintiff made out a

prima facie case of control and the court's determination that the plaintiff had failed to meet its burden and that reasonable minds could not differ thereto was in error and should be reversed. The jury verdict should be reinstated.

## II. THE TRIAL COURT'S ORDER GRANTING JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE VACATED

A judgment notwithstanding the verdict can be granted only when the losing party is entitled to a judgment as a matter of law. Hansen v. Stewart, 761 P.2d 14 (Utah 1988). A Judgment Notwithstanding the Verdict is only appropriate in the narrow circumstances where all of the testimony and all reasonable inferences flowing therefrom which tend to prove plaintiff's case are accepted as true, and all conflicting evidence which tends to disprove it are disregarded, and the court find a complete absence of any substantial evidence to support the verdict. Coer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967). Whether this court or the trial court agrees with the finding of the jury is not determinative. The only issue is whether the question of Parish Chemical's negligence should have gone to the jury.

The doctrine of res ipsa loquitur does not negate the burden of proof placed upon the plaintiff. Res ipsa only directs the jury towards a correct application of the law of negligence to circumstantial evidence. The trial court wrongly found that reasonable minds could not differ in this case. Reasonable minds did in fact differ from the trial court and found Parish Chemical negligent. The trial court's order should be vacated and the jury's verdict reinstated.

## CONCLUSION

The trial court erred in concluding that plaintiff failed to make a prima facie case and provide the foundation necessary for an instruction of res ipsa loquitur. The res ipsa loquitur instruction was properly given at trial. The trial court's order granting defendant's Judgment Notwithstanding the Verdict should be reversed and the verdict of the jury should be reinstated.

DATED AND SIGNED this 25th day of August, 1995.

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant with postage prepaid thereon this 25th day of August, 1995, to the following:

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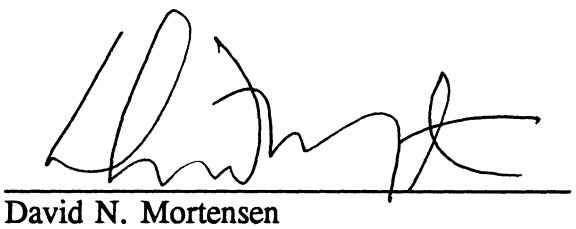

David N. Mortensen

# ADDENDUM A

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

(a) **Motion for directed verdict; when made; effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) **Motion for judgment notwithstanding the verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) **Same: Conditional rules on grant of motion.**

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) **Same: Denial of motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

# ADDENDUM B

# IN THE FOURTH JUDICIAL DISTRICT COURT
# UTAH COUNTY, STATE OF UTAH

| | |
|---|---|
| SONJI K. WALKER,<br>Plaintiff,<br><br>vs.<br><br>PARISH CHEMICAL COMPANY,<br>Defendant. | **MEMORANDUM DECISION**<br>CASE NO. 920400532<br>DATE April 28, 1995<br>JUDGE BOYD L. PARK |

This matter came before the Court on April 7, 1995 for oral arguments on defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial. The Court, having received and reviewed the motion, memorandum in support, supplemental memorandum, memorandum in opposition, and reply memorandum, having heard oral arguments, and having reviewed the applicable law, now makes the following findings and conclusions:

1. A trial was held on this matter in December 1994. At the end of plaintiff's case-in-chief, defendant moved to dismiss on the theory that plaintiff failed to establish the foundational elements necessary for its res ipsa loquitur claim. That motion was denied and defendant proceeded to put on its case. At the close of all evidence defendant moved for a directed verdict, again on the theory that the res ipsa loquitur foundational elements had not been proven. The Court decided to allow the case to go to the jury, and the jury delivered a Special Verdict on December 21, 1994, finding defendant Parish Chemical Company negligent at the time and place of the incident in question and under the circumstances as shown by the evidence. The jury further found that such negligence was a proximate cause of the incident in question, and awarded plaintiff Sonji Walker $11,700 in special damages and $10,000 in general damages.

2. The Judgment on Special Verdict was entered on January 17, 1995. Defendant requested a copy of the transcript for use in making its motion for judgment notwithstanding the verdict, but there was unavoidable delay in the creation of the transcript of the record because the original record of the trial proceedings was made by videotape. Accordingly, the parties stipulated to defendant's filing of its motion without the benefit of trial transcript so that defendant might comply with the 10-day limit specified in U.R.C.P. 50(b). Defendant moved the Court for leave to supplement its Memorandum In Support of the motion upon receipt of the trial transcript, and plaintiff moved the Court for leave to file her response to the motion within ten days after receiving defendant's supplemental memorandum.

3. On January 23, 1995, defendant filed with this Court (a) its Motion For Judgment Notwithstanding the Verdict or, in the Alternative, For New Trial, and (b) its Memorandum in Support. In its memorandum, defendant argued that plaintiff's case was necessarily predicated on the doctrine of res ipsa loquitur because plaintiff lacked proof of specific negligence.

4. Res ipsa loquitur is an evidentiary rule that allows an inference of negligence to be drawn if plaintiff establishes the requisite foundation. The Utah Supreme Court has identified the three elements needed to establish that foundation:

> (1) the accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used due care;
> (2) the agency or instrumentality causing the accident was at the time of the accident under the exclusive management or control of the defendant; and
> (3) the plaintiff's own use or operation of the agency or instrumentality was not primarily responsible for the accident.

*King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858, 861 (Utah 1992). Defendant argues that its motion for judgment notwithstanding the verdict or, in the alternative, for new trial should be granted because plaintiff failed to establish the first two elements identified in *King* and therefore was not entitled to a res ipsa loquitur jury instruction.

5. Plaintiff argues that the Court should focus its analysis of this matter on the jury instruction given to the jury rather than on the cases defendant cites regarding the application of the res ipsa loquitur doctrine. That jury instruction, taken from MUJI 4.1 and representing Utah law, is as follows:

> Ordinarily, the plaintiff must prove negligence and proximate cause by a preponderance of the evidence. However, under certain circumstances, one who suffers injuries may hold another responsible without direct proof of negligence. You may draw an inference of negligence and proximate cause if you find that the accident or injury occurred under the following conditions:
> (1) the type of accident or injury involved does not ordinarily occur unless someone is negligent; and
> (2) the accident or injury was caused by a force that was controlled only by the defendant, or if you cannot specifically identify the force, that the defendant was responsible for all likely causes of the accident or the injuries; and
> (3) plaintiff's actions were not the primary cause of the accident or injury.
> If you find that all of those conditions exist, then you may conclude that the defendant was negligent and that the defendant's negligence was the proximate cause of the plaintiff's accident or injury. However, you are not required to reach that conclusion. You should weigh all of the evidence in the case and decide whether a finding of negligence is warranted.

In addressing defendant's present argument that elements (1) and (2) of this instruction were not met, plaintiff argues that defendant emphasizes an application of res ipsa loquitur when defined generally and fails to address the facts of this case and this fire. Plaintiff alleges it was the facts presented at trial which convinced the Court that an instruction on res ipsa loquitur was properly given to the jury as a matter of law, and that the ultimate decision of whether the res ipsa loquitur doctrine applied was appropriately left to the jury. Plaintiff argues that, under the holding of *Lund v. Phillips Petroleum Co.*, 351 P.2d 952 (Utah 1960), all inferences involved when the Court makes its decision as to whether the jury instruction should be given must be construed in favor of the party seeking the instruction. Plaintiff

further argues that this Court's res ipsa loquitur instruction was proper when all inferences are construed in favor of the plaintiff in accordance with *Lund*.

## ELEMENT NO. 1: THE ACCIDENT WAS OF A KIND WHICH, IN THE ORDINARY COURSE OF EVENTS, WOULD NOT HAVE HAPPENED HAD THE DEFENDANT USED DUE CARE

6. In defendant's Reply Memorandum in Support of Motion For Judgment Notwithstanding the Verdict, defendant argues that the first element of res ipsa loquitur is, by definition, generally defined. In *Ballow v. Monroe*, 699 P.2d 719 (Utah 1985), the Utah Supreme Court determined that the first res ipsa element requires proof that "the event causing the damage is *of a type* that ordinarily would not happen except for someone's negligence." *Id.* at 721 (emphasis added). Defendant argues that proof of the first res ipsa element is not found in the individual facts of the case, but from "the common knowledge and experience of the community with respect to how such events generally occur." *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858, 862 (Utah 1992). Defendant maintains that our community's common knowledge and experience tell us that fires frequently occur without negligence, and that "a fire of unknown origin [does] not in [itself] justify the conclusion that negligence is the most likely explanation; and to such events res ipsa loquitur does not apply." *Prosser and Keeton on Torts* § 39 at 246 (5th ed. 1984) (footnotes omitted).

7. Defendant cites a number of out-of-state cases which support the argument that the res ipsa loquitur doctrine is inapplicable when negligence is not found.[1] In addition, both

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[1]*Royal Ins. Co. v. United Parcel Service, Inc.*, 147 F.R.D. 15 (E.D. N.Y. 1992), *aff'd* 992 F.2d 320 (2nd Cir. 1992) (res ipsa inapplicable when no proof that the fire would probably not have occurred in the absence of negligence); *Milwaukee Land Co. v. Basin Produce Corp.*, 396 F. Supp. 528 (E.D. Wash. 1975) (res ipsa inapplicable in that case because fires occur in the absence of negligence); *Foerster v. Fischbach-Moore, Inc.*, 178 N.W.2d 258 (N.D. 1970) (res ipsa not submitted to jury because fires frequently occur without negligence); *In Re Estate of Morse*, 391 P.2d 117 (Kan. 1964) (courts reluctant to

parties discuss the Utah case of *Ballow v. Monroe*, 699 P.2d 719 (Utah 1985). In *Ballow*, plaintiff, a landowner, brought a negligence action against defendant to recover damages for the loss of crops and fencing destroyed by a fire apparently caused by defendant when swathing his own neighboring field. The trial court refused to give instructions to the jury on the res ipsa loquitur doctrine. The Utah Supreme Court affirmed this decision, holding that the plaintiff landowner's testimony that fires are virtually unavoidable when swathing and often occur even when reasonable care is exercised did not constitute foundation warranting a finding of res ipsa loquitur.

8. Plaintiff argues that the *Ballow* case stands for the proposition that, in order to prove that an accident is one that would not have ordinarily occurred without negligence, plaintiff need only submit evidence that the occurrence of the incident is "more probably than not caused by negligence." *Ballow*, 699 P.2d at 722 (citation omitted). The *Ballow* court went on to state that "[t]he plaintiff need not eliminate all possible inferences of non-negligence, but the balance of probabilities must weigh in favor of negligence, or res ipsa loquitur does not apply." *Id.* Plaintiff also quotes the *Ballow* court as follows:

> If the law imposes a duty of great care, or a duty to inspect for dangerous conditions, the giving of a res ipsa instruction may be justified on a less compelling degree of probability than if the degree of care required were only reasonable care.

*Id.* Plaintiff argues that the present case is readily distinguished from *Ballow*, since the plaintiff in *Ballow* himself testified that fires "just happen" and are essentially unavoidable

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apply res ipsa to fire cases because fires frequently occur without negligence); and *Gutknecht v. Wagner Bros. Moving & Storage Co.*, 266 S.W. 2d 19 (Mo. App. 1954) (res ipsa inapplicable because fires commonly occur where care has been exercised as well as where care has been lacking).

when swathing.[2] Plaintiff here maintains that no evidence has been presented to suggest that fires are unavoidable in the present case, and that there is abundant circumstantial evidence here to justify a finding that defendant was negligent and that res ipsa loquitur instructions were appropriately given to the jury.

9. Defendant argues that the *Ballow* court determined that res ipsa loquitur is inapplicable "unless it can be shown from past experience that the occurrence causing the disability is more likely the result of negligence than some other cause." *Ballow*, 699 P.2d 719, 722 (quoting *Talbot v. Dr. W.H. Groves' Latter-Day Saints Hospital*, 440 P.2d 872, 873-4 (Utah 1968)). Defendant again argues that the "past experience" referred to by the *Ballow* court is the past experience of the community or of an expert, and can be established by reference to "the common knowledge and experience of the community with respect to how such events generally occur." *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858, 862 (Utah 1992). However, if "the probabilities of a situation are outside the realm of common knowledge," expert testimony would have been needed to prove this element. *See Ballow v. Monroe*, 699 P.2d 719 (Utah 1985); *see also King*, 832 P.2d at 862. Defendant then argues that testimony from Russell Ted Peacock, Director of Public Safety for the City of Orem, was the only expert testimony provided at trial, and that Mr. Peacock testified (a) that fires occur from a variety of causes that do not involve negligence; and (b) that the fire at Parish

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[2]Defendant maintains that this testimony had nothing to do with the *Ballow* court's res ipsa analysis, and that the court in that case stated as follows:

> Plaintiff's testimony was that fires are virtually unavoidable when swathing and that fires "just happen," even when exercising reasonable care. On this testimony, the jury could, of course, have found that defendant had a duty to take reasonable precautions to prevent the spread of a fire, but that raises no issue concerning res ipsa loquitur.

*Ballow*, 699 P.2d at 723. Because the plaintiff in *Ballow* could not meet his burden of proof on the cause of the fire, the *Ballow* court concluded that plaintiff had not established a foundation warranting res ipsa loquitur instructions.

Chemical was of unknown origin. Defendant further argues that Professors Prosser and Keaton, the Utah Supreme Court, and courts of other jurisdictions have all determined that res ipsa loquitur is inapplicable in cases involving fires of unknown origins, and that the first element needed to justify application of the res ipsa loquitur doctrine, that fires normally do not occur without negligence, is contrary to both the common knowledge and the experiences of our community. Defendant urges the Court to find that, because plaintiff did not provide expert testimony to refute that common knowledge and experience, plaintiff failed to establish the first res ipsa element.

10. In response, plaintiff asserts that the foundation from which a logical conclusion can be drawn that an injury was probably caused by defendant's negligence is indeed within the common knowledge and experience of the community. Plaintiff argues that the jury knew there was nothing in Stockroom A that would burn except the chemicals; the floor was made of concrete, the walls were made of concrete and cinder block, the shelves were made of steel, the ceiling was made of a nonflammable tile,[3] and the evidence showed there were no appliances or other machinery or instruments in the room which could cause a fire. Accordingly, plaintiff argues that application of the res ipsa loquitur doctrine to this case is appropriate because the circumstances strongly suggest that the fire would not have occurred absent any negligence on the part of defendant.

**ELEMENT NO. 2: THE AGENCY OR INSTRUMENTALITY CAUSING THE ACCIDENT WAS AT THE TIME OF THE ACCIDENT UNDER THE EXCLUSIVE MANAGEMENT OR CONTROL OF THE DEFENDANT.**

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[3]Defendant disagrees with plaintiff's interpretation of testimony concerning the flammability of the ceiling tile, and refers the Court to the testimony of Dr. Parish, who stated that he observed ballast catch fire and drip hot burning tar, but that the ceiling material in Stockroom A did not catch on fire. Defendant argues that this constitutes Dr. Parish's simple observation of one ballast catching fire and does not constitute testimony that the ceiling material was nonflammable.

11. Defendant argues that the fire at Parish Chemical was a fire of unknown origin, and alleges that attempts to predicate liability in such cases on the doctrine of res ipsa loquitur are almost always unsuccessful. Defendant cites *Barnhill v. Young Electric Sign Co.*, 374 P.2d 311 (Utah 1962), in support of its argument that the res ipsa loquitur doctrine is inapplicable in the absence of evidence showing what instrumentality caused the fire:

> It is clear . . . that the doctrine cannot be invoked to show negligence until "the initial fact, namely what thing or instrumentality caused the accident, has been shown. . . . [T]hen, and not before, an inference arises that the injury or damage occurred by reason of the negligence of the party who had . . . [the instrumentality] under his exclusive control."

*Id.* at 312 (quoting *Emigh v. Andrews*, 191 P.2d 901, 903 (Kan. 1948)). The trial court in *Barnhill* granted defendant's motion for a directed verdict, disagreeing with plaintiff's argument that circumstantial evidence pointed to defendant's faulty installation and maintenance of a large electric sign as the cause of the fire. On appeal, the Utah Supreme Court considered whether "the plaintiff trace[d] the cause of the fire to an instrument for which the defendant was responsible so that the cause of the fire was not left to conjecture." *Id.* at 312. Because the evidence in *Barnhill* pointed to many possible causes but could not "be traced to a specific instrumentality or cause for which defendant was responsible," *id.* at 313 (quoting Prosser, Torts § 42 at 204-05 (2d ed. 1955)), the Utah Supreme Court concluded that "[t]he trial court properly refused to allow the jury to speculate on this issue." *Id.* at 314.

12. Plaintiff argues that *Barnhill* is distinguishable from the case now before this Court because the defendant in *Barnhill* had shown many other possible causes for the fire which could be attributed to the plaintiff, and that no such showing was made in the present case. Because the *Barnhill* defendant had been able to raise so many reasonable alternative causes of the fire, the *Barnhill* court refused to allow a res ipsa instruction unless plaintiff could trace the cause of the fire to an instrument for which the defendant was responsible. In the case now before this Court, plaintiff argues that she ought not be required to identify the

instrumentality causing the fire because plaintiff was able to exclude all but a couple of ways in which this fire could have started, and either of those indicated negligence on the part of the defendant. Plaintiff first argues that if chemicals were mixed or containers improperly stored, thus causing the fire, defendant's negligence would be established. Second, plaintiff argues that if the fire was caused by arson, negligence on the part of defendant would be established for not providing a lock on Stockroom A or for leaving the back door to the establishment completely open and unguarded.[4] Defendant disagrees with this interpretation of *Barnhill*, arguing that the burden of proof is upon plaintiff and that defendant has no obligation to make any showing concerning the cause of the Parish Chemical fire, and maintains that the *Barnhill* court's statement concerning the need to show what caused the fire was a statement of law at the beginning of the opinion, supported by a footnote citing several other cases and one legal treatise.

13. Plaintiff also argues that, under the Utah Supreme Court's review of the res ipsa loquitur doctrine in *King v. Searle Pharmaceutical, Inc.*, 832 P.2d 858 (Utah 1992), the second res ipsa element should not be rigidly applied:

> The second element, exclusivity of management or control, should not be rigidly applied. Rather, that element should focus on the degree of a defendant's management or control necessary to provide a persuasive inference of liability on the defendant's part. In other words, something less than exclusive management or control may suffice to make out a prima facie case of res ipsa loquitur. To establish the second requirement, the plaintiff need only show "that it is more likely than not that the defendant was the party responsible for the injury."

*Id.* at 861-62 (citing *Ballow v. Monroe*, 699 P.2d 719, 721 (Utah 1985)).

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[4]Plaintiff alleges that "[t]he corporate defendant admitted at trial that the building would have been more secure if the alarm system had been activated or a guard left." *See* Memorandum in Opposition to Defendant's Motion For Judgment Notwithstanding the Verdict or a New Trial at 15.

14. In plaintiff's Memorandum in Opposition to Defendant's Motion For Judgment Notwithstanding the Verdict or a New Trial, entered on February 28, 1995, plaintiff argues that the elements of res ipsa loquitur were established by the admissions of the defendant. Plaintiff alleges (a) that defendant admitted that plaintiff's actions were not a cause of the fire; (b) that defendant admitted it was in exclusive control of all likely causes of the fire; and (c) that defendant admitted that the fire occurred either due to a breach in security or through mishandling or improper storage of chemicals.

15. Defendant alleges that the testimony of both Mark Karamesines, the Parish Chemical Company plant manager, and Dr. Walter Wesley Parish, Parish Chemical Company president, offered only speculation concerning possible causes of the fire. Defendant argues that although these witnesses could not rule out the possibility of a potential cause of the fire, plaintiff did not offer evidence suggesting that any such possibility was likely. Defendant also argues that the issue here is not one of combustibility, but of ignition, and that no witness could offer facts tracing "the cause of the fire to an instrument for which the defendant was responsible." *Barnhill*, 374 P.2d at 312. Accordingly, defendant maintains that the second res ipsa element has not been satisfied.

16. Defendant further argues that res ipsa does not allow proof of the foundational facts by inference. Defendant quotes from a Kansas Supreme Court case, *Emigh v. Andrews*, 191 P.2d 901 (Kan. 1948), which clarified the interpretation of res ipsa loquitur, or "the thing speaks for itself," as follows:

> [This] means the *thing or instrumentality* involved speaks for itself. It clearly does not mean the *accident* speaks for itself. It means that when the initial fact, namely what thing or instrumentality caused the accident has been shown then, and not before, an inference arises that the injury or damage occurred by reason of the negligence of the party who had it under his exclusive control.

*Id.* at 903. Because plaintiff did not provide evidence at trial as to the source of the ignition of the fire, defendant argues that application of res ipsa is inappropriate under Utah law.

## CONCLUSIONS OF LAW

17. The Court finds that plaintiff has not proven either of the first two res ipsa elements outlined in *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858 (Utah 1992). In that case, the Utah Supreme Court clearly stated that in order to establish a res ipsa loquitur case a plaintiff "must lay a foundation from which it can be established that negligence was probably the cause of the injury." *Id.* at 862. Furthermore, the *King* court identified the standard to be used in ordinary res ipsa loquitur cases as the foundation from which a logical conclusion can be drawn that an injury was probably caused by negligence. That standard is "the common knowledge and experience of the community with respect to how such events generally occur." *Id.* In certain cases where the drawing of an inference as to causality is beyond the realm of common knowledge and experience, *King* indicates that expert testimony may be produced. *Id.* at 863. The only expert witness in the case now before this Court testified that the Parish Chemical fire was of unknown origin; furthermore, it is common knowledge that fires can occur without negligence.

18. This Court agrees with the following statement contained in *Barnhill v. Young Electric Sign Co.*, 374 P.2d 311 (Utah 1962): "It is clear . . . that the [res ipsa loquitur] doctrine cannot be invoked to show negligence until 'the initial fact, namely what thing or instrumentality caused the accident, has been shown.'" *Id.* at 312. The Court does not agree with plaintiff that negligence on the part of defendant is indicated by either of the two possible ways the fire may have been started, as proposed by plaintiff: improper mixing or storage of chemicals, or arson.

19. In *Ballow v. Monroe*, 699 P.2d 719 (Utah 1985), the Utah Supreme Court stated that, "[b]efore a plaintiff is entitled to a jury instruction on res ipsa loquitur, the plaintiff must have presented evidence that the occurrence of the incident is 'more probably than not caused by negligence.'" *Id.* at 722. The Court does not find that plaintiff in the present case provided such evidence, and the Court concludes that it was in error in allowing the jury to

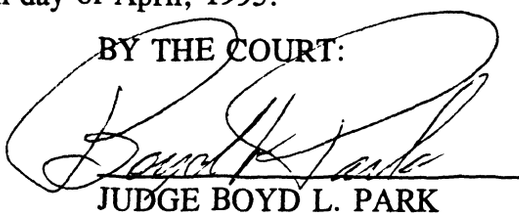
be given an instruction on the res ipsa loquitur doctrine. The Court grants defendant's motion for a judgment notwithstanding the verdict.

20. This case has been before this Court twice, once resulting in a mistrial. It is apparent that no new evidence would be available at a new trial, and therefore the Court does not grant defendant's motion for a new trial.

Counsel for defendant is to prepare, within 15 days of the date hereof, an order consistent with the terms of this decision and submit it to opposing counsel for approval as to form prior to submission to the Court for signature.

Dated at Provo, Utah this 28th day of April, 1995.

BY THE COURT:



JUDGE BOYD L. PARK

cc: Jeff Peatross
Eric P. Lee

# ADDENDUM C

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

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| SONJI K. WALKER, | : | ORDER |
| Plaintiff, | : | |
| v. | : | |
| PARISH CHEMICAL COMPANY, | : | Civil No. 920400532 |
| Defendant. | : | Judge Boyd L. Park |

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Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial came before the Court for oral argument on April 7, 1995. Having heard oral argument, and having reviewed all memoranda and the applicable law, the Court issued its Memorandum Decision on April 28, 1995, concluding plaintiff failed to prove the first two foundational elements of the res ipsa loquitur doctrine as outlined in *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858 (Utah 1992).

Based on the Court's Memorandum Decision and good cause appearing, it is hereby ORDERED as follows:

1. Defendant's motion for judgment notwithstanding the verdict is granted.

2. Defendant's alternative motion for new trial is denied.

3. The December 21, 1994, Special Verdict and the January 31, 1995, Amended Judgment on the Special Verdict are hereby set aside and judgment shall be entered in favor of defendant Parish Chemical Company in accordance with its motion and this Order.

DATED this 18 day of May, 1995.

BY THE COURT:

HONORABLE BOYD L. PARK
District Judge


Approved as to Form:

JEFFERY C. PEATROSS
DAVID N. MORTENSEN
IVIE & YOUNG
Attorneys for Plaintiff

# ADDENDUM D

The evidence of almost everything in this case has been destroyed, and that is a problem. Where it has been destroyed and as I understand the evidence in this case, the fire really consumed the one area, and that was called Laboratory "A" or what was that?

MR. LEE: Stockroom "A".

THE COURT: Stockroom "A" and that is the only evidence that I can see is that is a particular area. Whether the fire actually started there or not or whether it traveled down the hallway or some other place and came in under the door, we don't know. Mr. Parish says that he doesn't know how it started. He doesn't know whether the fire started there or not. But obviously, the effect of the fire is greatest in Stockroom "A", as I understand this evidence. That Stockroom "A" is the place where the flames leaped from the window and that was observed by various employees. This is the area where the primary destruction was. There had to be something in that room that would be combustible. Even if a fire traveled down the hallway and some way crawled under the door or through the door that room was primarily non-combustible except for the chemicals that were in the room.

It appears to me that I am going to have to conclude that is a sufficient inference, the accident was the kind which in the ordinary course of events would not have happened

had the defendant not, had the defendant used due care.

We don't have any evidence on the negligence in and of itself and your argument with regard to negligence is correct. If this was just simply a straight negligence case, I would grant your motion, but it is more than a negligence case. It is a Res Ipsa case in this court's view. It is a close Res Ipsa case. I would think under this case where we simply have nothing here that we can put our hands on. There is no question that Parish Chemical had control of the building, had control of the chemicals, had set up a variety of safety features to prevent people from interloping on the property to prevent stealing, to prevent accidents of any kind. There is no question about that they have done that. That means then that is strictly within their control. But those chemicals do not erupt and they do not have a force of fire and whether there is an explosion or not maybe or maybe not but there has to be a source in which fire can go to in order to continue. That source obviously was in that room.

Now how the fire got to that source without there being some spillage is really, in my mind, an impossibility. If there is no spillage of any of the chemicals or if there was no explosion to blow the chemicals off the shelves so that they can be broken and then exposed, then the only other way is, in my view, is that there has to be some inference of

negligence in which these chemicals were made available to some source which triggered the fire some ignition source whether it was inside the room or whether it was outside of the room. The fire burned there and in my view this then becomes a Res Ipsa case, okay.

MR. PEATROSS: Your Honor with that being out of the way, first of all I think that takes care of all of the jury instructions.

THE COURT: Well, I don't know if the defendant wants to put on some evidence.

MR. PEATROSS: That is true, I will address that later. I was just going to note that we had stipulated to everything but that. You are right they may have some other rebuttal or something. As a matter of fact they haven't rested so I had better wait.

MR. LEE: I guess, and I have heard your ruling, Your Honor. I am not quite clear on it and maybe for purposes of another motion in the event we get an adverse verdict I would just like a little clarification. Is the court saying that the evidence that there is a possibility that this was a electrical fire, isn't that a possibility in this case?

THE COURT: Well, I don't think to get to a Res Ipsa case that you have to rule out everything in the world. There is no evidence one way or the other there was an

electrical fire.

The only evidence in front of this court at this point and time is that no one knows the source of that fire. All we have to come is an inference of negligence that can be drawn. What I am saying that I don't know what the triggering force is. I don't know what the ignition force is, but I do know, from the evidence, that the place that burned was Stockroom "A". That means that the only thing in there that was combustible was in fact the chemicals.

Now you can stand there with a torch and blow it underneath the door or you can strike matches in there or you can have electrical sparks in there, and unless there is something combustible, it is not going to burn. Therefore, there is something in that room that caused that room to burn. That is as I view the evidence. You may view it differently but that is how I view it.

MR. LEE: I view it the same way, Your Honor.

THE COURT: Therefore, there has to be some inference of some negligence either a jar was not closed, a jar was broken or something of that nature so there were some fumes escaping which were flammable.

MR. LEE: Okay, so what the court is saying is, and I guess where I am getting tripped up is that the court is saying that we have eliminated all these other possibilities so it must have been negligence. As I understand the law it is just the opposite. They have to show that this

wouldn't have happened except for the defendant had been negligent. There has to be an affirmative showing of negligence.

THE COURT: What it says the accident was of a kind which in the ordinary course of events would not have happened had the defendant used due care. In this case I think there is an inference that they did not use due care. We don't know what that is. Like I said, I don't know if that is a broken vessel. I don't know if a lid was left off. I don't know what, but I do believe the evidence is such that there was something in there that was combustible because that is where the primary source of the fire was. Mr. Karamesines says that was a very hot fire. It was right there is where the flames shot out of the window.

Now what is the triggering mechanism that creates the fire, I don't know but I don't think that matters.

MR. LEE: But isn't what matters , after what matters, Your Honor, it is not what burned, is how the fire started in the first place.

THE COURT: Well, no I don't think that is so. I think if you want to say anything out there as I mentioned before if you want to say well this could have been an electrical fire that may have been an electrical fire. The fact of the matter is there was something in there that was

combustible and made a very very hot fire. In that particular storage room if there hadn't been some fumes that were combustible I don't think the fire would have done it. Like I say you could have walked in there with a match, a cigarette lighter, a blow torch but something had to burn. It wasn't the walls and it wasn't the metal shelves, none of those were combustible. It wasn't the cement. The only thing is the fumes.

MR. LEE: We have acoustical ceiling tiles, had plaster walls.

THE COURT: To get to the ceiling you are going to have to have a pretty raging fire, I would think.

MR. PEATROSS: This may be helpful to counsel.

THE COURT: No, it is my ruling.

MR. PEATROSS: Okay.

THE COURT: And if it goes up, it is my ruling. I don't want you involved with it, other than what you have already said.

MR. PEATROSS: I would make a motion to reopen either , let's cover this now as long - -

THE COURT: It depends on whether he rests or not.

MR. PEATROSS: I am sorry.

THE COURT: He wants some clarity for appeal purposes and he is entitled to it. I don't know how to say it any clearer.

MR. LEE: Let me just finish it with this, Your Honor. Is your ruling that if the storage of chemicals in a way that could start a fire is enough to draw an inference of negligence?

THE COURT: Not the storing of the chemicals, necesarily the storing, it is the treatment of those chemicals. We don't have any evidence that there was any jars with lids off. We don't have any evidence that there was any broken jars. We have the evidence of Mr. Karamesines going through there and spending a few minutes in there and didn't see anything out of order. It could have been very well that there is a lid off. There could have been something ajar that he would not have noticed in a quick walk through. I am saying that absent that there would have been no combustion in that room.

MR. LEE: Okay, thank you.

MR. PEATROSS: Your Honor, I did rest but I stated that I wanted to get some more exhibits in and I will proffer it.

THE COURT: Has counsel seen it?

MR. PEATROSS: Yes, he has agreed to it. Your Honor - -

THE COURT: Wait a minute, let's finish what you are doing.

MR. PEATROSS: I was just bringing that up.